Jamaludin bin Idris & Anor v Petronas Dagangan Bhd & Anor

HIGH COURT (IPOH) — WRIT SUMMONS NO AA-22NCVC-78–08 OF 2017
HASHIM HAMZAH J
24 FEBRUARY 2020

Tort — Nuisance — Private nuisance — Whether defendants caused unreasonable interference with plaintiffs' enjoyment over plaintiff's land — Whether interference caused damage to plaintiff

Civil Procedure — Injunction — Whether plaintiff could seek injunction against defendants — Whether plaintiff could seek damages against defendants

This was an action filed by the plaintiffs against the defendants under the tort of nuisance. The plaintiffs was the co-owners of a house located at a No 2348, Jalan Sembilang 1, Taman Samudera, 32040 Seri Manjung, Perak ('the plaintiffs' house'). The first defendant was the owner of a petrol and service station located at Lot 6985–7010, Taman Samudera, 32040, Seri Manjung, Perak ('the petrol station'). The second defendant was the national sewerage company which had been entrusted with the task of developing and maintaining a modern and efficient sewerage system for all Malaysians. The second defendant owns and maintains the underground sewerage pipelines located under the plaintiffs' house as well as under the petrol station. The plaintiffs' house was located approximately 500 metres away from the petrol station and was the last house on the row. There were approximately 30 houses in between the Petrol Station and the plaintiffs' house. On 12 June 2012, the first plaintiff wrote a letter to the District Officer in Manjung complaining that his family had been suffering certain discomfort for about one month due to the emission of a very unpleasant odour, akin to that of chemical gas or oil, from below the floor of his master bathroom which permeated throughout his entire house. The first plaintiff also complained that sometimes the floor of his house would feel hot. On 22 June 2012, Manjung Municipal Council together with several government agencies such as the Department of Environment ('DOE'), and the Fire and Rescue Department ('Bomba') including the second defendant had conducted a site visit to look into the plaintiffs' complaints. The first defendant was not involved in this visit. Based on the said test result, the officers who attended the site visit made a preliminary finding that there was a leakage of chemical or oil from the petrol station's underground tanks into the second defendant's underground main sewerage pipelines which extended to the plaintiffs' housing area. It was found that this was the main cause of the unpleasant chemical odour or gas allegedly experienced by the plaintiffs.

Approximately two weeks later, the plaintiffs and their two children went to Hospital Seri Manjung to get treatment for, among others, 'alleged nitrus oxide exposure'. The main issue in the present case was whether the plaintiffs had successfully proven their claim against the defendants on the balance of probabilities.

Held:

(1) Upon careful perusal of all the evidence produced throughout this trial, the court agreed with learned counsel for the defendants that the most glaring loophole in the plaintiffs' case was their failure to prove the exact nature of the odour complained of and its nexus to the defendants (see para 36).

(2) First and foremost, it became apparent throughout the trial that the preliminary finding stated in the said report was not conclusive and the finding was reached based on the parties' initial observation during the site visit. Secondly, PW6 had admitted during cross-examination that his finding that the unpleasant odour or chemical gas was emitted as a result of an oil leakage in the petrol station's sewerage tanks was solely based on his presumption. Thirdly, in consequence to the preliminary finding, several meetings were held to address the issue. The defendants were initially requested to conduct a pressure test and the result showed that there was no leakage from the petrol station's sewerage tank to the main sewerage pipeline. After that, the connection between the Petrol Station's sewerage tank and main sewerage pipeline was sealed off and there was no longer any connection whatsoever between the petrol station and second defendant's underground sewerage pipelines that flowed underneath the plaintiffs' housing area. The petrol station thereafter started to use its own private septic tank. The first defendant was then requested to perform water pressure tests and the result confirmed that there was no leakage (see paras 38, 44 & 49).

(3) At this juncture, it was imperative to note that the results of the pressure and water pressure tests conducted by the first defendant confirmed that there was no leakage whatsoever in the petrol station's underground tanks which had fully discredited the said test result and the preliminary finding stated in the said report. It is also important to note that since August 2012, the sole connection between the petrol station, the second defendant's underground sewerage pipes and the plaintiffs' house had been sealed off. Notwithstanding the above, the plaintiffs maintained that they are still suffering from the same emitted odour or chemical gas. However, the second defendant's witnesses who went to the plaintiffs' House for another inspection on 5 April 2016 ie DW10, DW11 and DW13 maintained that there was no longer any odour or gas as alleged by the plaintiffs detected around the plaintiffs' house at that time. In the

present case, the plaintiffs were under the duty to prove that the unreasonable interference was caused by the defendants. For reasons mentioned above, the court was of the view that they had failed to do so (see paras 51–54).

(4) There was no direct and definitive link whatsoever between what the plaintiffs' children had suffered at that time with the defendants. Another claim made by the plaintiffs was that they have not been able to continuously live in their home since the issues occurred in the year 2012. It was further claimed that they have only resumed living in their home again in 2017. Suffice to say that no evidence was led to support these bare statements made by the plaintiffs. Therefore, the plaintiffs had failed to prove that they had suffered any damage (see paras 60–62).

(5) Throughout the trial there was no evidence led to prove the existence of any gas pipes neither at the petrol station nor underneath the plaintiffs' House. Therefore, the injunctive reliefs prayed for by the plaintiffs against the first defendant are misconceived and could not be granted by this court. The plaintiff had failed to show any unreasonable interference caused by the defendants (including the second defendant) against the plaintiffs' enjoyment over their land. Therefore, the injunctive relief prayed for by the plaintiffs against the second defendant was equally misconceived and could not be granted by this court. The plaintiffs have also prayed for general, special and exemplary damages against the defendants for the damage that they had purportedly suffered. However, based on what had been alluded regarding the plaintiffs' failure to prove damage against the defendants, this prayer was dismissed in its entirety (see paras 65 & 68–69).

[Bahasa Malaysia summary

Ini adalah tindakan yang difailkan oleh pihak plaintif terhadap pihak defendan di bawah tort kacau ganggu. Plaintif adalah pemilik bersama sebuah rumah yang terletak di No 2348, Jalan Sembilang 1, Taman Samudera, 32040 Seri Manjung, Perak ('rumah plaintif'). Defendan pertama adalah pemilik stesen minyak dan perkhidamatan yang terletak di Lot 6985–7010, Taman Samudera, 32040, Seri Manjung, Perak ('stesen minyak tersebut'). Defendan kedua adalah syarikat pembentungan nasional yang telah diberi tugas untuk memaju dan mengekalkan sistem pembentungan yang moden dan cekap untuk semua rakyat Malaysia. Defendan kedua memiliki dan menyelenggara saluran paip pembetungan bawah tanah yang terletak di bawah rumah plaintif dan juga di bawah stesen minyak tersebut. Rumah plaintif terletak kira-kira 500 meter dari stesen minyak dan merupakan rumah terakhir di barisan tersebut. Terdapat kira-kira 30 rumah di antara stesen minyak tersebut dan rumah plaintif. Pada 12 Jun 2012, plaintif pertama menulis surat kepada Pegawai Daerah di Manjung membuat aduan bahawa keluarganya mengalami ketidakselesaan selama kira-kira satu bulan oleh kerana bau yang sangat tidak

menyenangkan yang dibebaskan, seperti gas kimia atau minyak, dari bawah lantai bilik mandi utamanya yang tersebar ke seluruh rumahnya. Plaintif pertama juga mengadu bahawa kadang kala lantai rumahnya terasa panas. Pada 22 Jun 2012, Majlis Perbandaran Manjung bersama dengan beberapa agensi kerajaan seperti Jabatan Alam Sekitar ('JAS'), dan Jabatan Bomba dan Penyelamat ('Bomba') termasuk defendan kedua telah melakukan lawatan ke lokasi untuk memeriksa aduan oleh plaintif. Defendan pertama tidak terlibat dalam lawatan ini. Berdasarkan hasil ujian tersebut, para petugas yang menghadiri lawatan di lokasi membuat dapatan awal bahawa terdapat kebocoran bahan kimia atau minyak dari tangki bawah tanah stesen minyak ke saluran paip pembetungan utama bawah tanah defendan kedua ke kawasan perumahan plaintif. Ianya telah didapati bahawa ini adalah penyebab utama bau kimia atau gas yang tidak menyenangkan yang didakwa dialami oleh plaintif. Kira-kira dua minggu kemudian, plaintif dan kedua anaknya pergi ke Hospital Seri Manjung untuk mendapatkan rawatan, antara lain, kerana 'pendedahan nitrogen oksida'. Isu utama dalam kes semasa adalah sama ada plaintif berjaya membuktikan tuntutan mereka terhadap defendan berdasarkan imbangan kebarangkalian.

Diputuskan:

(1) Setelah meneliti dengan hemat kesemua keterangan yang dikemukakan sepanjang perbicaraan ini, mahkamah bersetuju dengan peguamcara defendan yang bijaksana bahawa kelemahan yang paling jelas dalam kes plaintif adalah kegagalan mereka membuktikan sifat tepat bau yang diadu dan hubungannya defendan (lihat perenggan 36).

(2) Pertama sekali, ianya amat jelas sepanjang perbicaraan bahawa dapatan awal yang dinyatakan dalam laporan tersebut tidak muktamad dan dapatan tersebut dicapai berdasarkan pemerhatian awal pihak-pihak semasa lawatan ke lokasi tersebut. Kedua, PW6 telah mengakui semasa pemeriksaan balas bahawa dapatannya pada bau atau gas kimia yang tidak menyenangkan yang dikeluarkan akibat kebocoran minyak di tangki pembentungan stesen minyak tersebut hanyalah berdasarkan anggapannya. Ketiga, berdasarkan kepada dapatan awal, beberapa mesyuarat telah diadakan untuk mengatasi masalah tersebut. Defendan pada mulanya diminta untuk melakukan ujian tekanan dan keputusannya menunjukkan bahawa tidak ada kebocoran dari tangki pembentungan stesen minyak ke saluran paip pembetungan utama. Selepas itu, saluran penghubung antara tangki pembentungan stesen minyak dan saluran paip pembetungan utama ditutup dan tidak ada lagi saluran penghubung antara stesen minyak dan saluran paip pembetungan bawah tanah defendan kedua yang mengalir di bawah kawasan perumahan plaintif. Stesen minyak selepas itu mula menggunakan tangki septik peribadinya sendiri. Defendan pertama kemudian diminta untuk melakukan ujian tekanan air dan

keputusannya mengesahkan bahawa tidak ada sebarang kebocoran (lihat perenggan 38, 44 & 49). A

(3) Pada ketika ini, ia adalah sangat mustahak untuk menyatakan bahawa keputusan tekanan dan tekanan air yang dijalankan oleh defendan pertama mengesahkan bahawa tidak ada sebarang kebocoran sama sekali di tangki bawah tanah stesen minyak yang telah sepenuhnya menolak keputusan ujian dan dapatan awal yang dinyatakan dalam laporan tersebut. Ia juga sangat penting untuk dinyatakan bahawa sejak Ogos 2012, satu-satunya saluran penghubung antara stesen minyak, paip pembetungan bawah tanah defendan kedua dan rumah plaintif telah ditutup. Walau apa pun yang dinyatakan di atas, plaintif tetap menyatakan bahawa mereka masih menderita akibat bau atau gas kimia sama yang dibebaskan. Walau bagaimanapun, saksi defendan kedua yang pergi ke rumah plaintif untuk pemeriksaan lanjut pada 5 April 2016 iaitu DW10, DW11 dan DW13 menyatakan bahawa tidak ada lagi bau atau gas seperti yang didakwa oleh pihak plaintif yang dikesan di sekitar rumah plaintif pada masa tersebut. Dalam kes semasa, plaintif mempunyai tugas untuk membuktikan bahawa kacau ganggu tidak wajar tersebut adalah disebabkan oleh defendan. Atas alasan-alasan yang dinyatakan di atas, mahkamah berpendapat bahawa mereka gagal melakukannya (lihat perenggan 51–54). B C D E

(4) Tidak ada hubungan langsung dan tepat antara apa yang anak-anak plaintif alami pada masa itu dengan defendan. Dakwaan lain yang dibuat oleh plaintif adalah bahawa mereka tidak dapat terus tinggal di rumah mereka sejak isu tersebut berlaku pada tahun 2012. Ia selanjutanya didakwa bahawa mereka hanya kembali tinggal di rumah mereka pada tahun 2017. Cukup bagi mengatakan bahawa tidak ada keterangan dikemukakan untuk menyokong pernyataan kosong yang dibuat oleh pihak plaintif. Oleh itu, plaintif gagal membuktikan bahawa mereka telah mengalami sebarang kerugian (lihat perenggan 60–62). F G

(5) Sepanjang perbicaraan tidak ada keterangan yang membuktikan wujudnya paip gas di stesen minyak ataupun di bawah rumah plaintif. Oleh itu, relif injunksi yang dipohon oleh plaintif terhadap defendan pertama adalah anggapan salah dan tidak dapat dibenarkan oleh mahkamah ini. Plaintif gagal menunjukkan kacau ganggu yang tidak wajar yang disebabkan oleh defendan (termasuk defendan kedua) terhadap kesenangan pihak plaintif atas tanah mereka. Oleh itu, relif injunksi yang dipohon oleh pihak plaintif terhadap defendan kedua adalah anggapan salah sama dan tidak dapat dibenarkan oleh mahkamah ini. Plaintif juga telah memohon ganti rugi am, khas dan teladan terhadap defendan atas kerugian yang telah mereka kononnya alami. Namun, berdasarkan apa yang dicadangkan mengenai kegagalan plaintif untuk membuktikan kerugian terhadap defendan, permohonan ini H I

ditolak secara keseluruhan (lihat perenggan 65 & 68–69).]

Cases referred to

Associated Pan Malaysia Cement Sdn Bhd v Westwood Development Sdn Bhd [2014] 7 MLJ 394; [2013] 10 CLJ 95, HC (folld)

Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53, HL (refd)

Chin Moy Yen & Ors v Chai Weng Sing & Ors [2019] MLJU 681; [2019] 1 LNS 940, CA (refd)

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712; [2005] 5 CLJ 253, HC (refd)

IJM Corporation Bhd v Harta Kumpulan Sdn Bhd [2007] 8 MLJ 591; [2007] 8 CLJ 291, HC (refd)

Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)

Sedleigh-Denfield v O'Callaghan [1940] 3 All ER 349, HL (refd)

Selvaduray v Chinniah [1939] 1 MLJ 253; [1939] 1 LNS 107 (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)

UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4; [1978] 1 LNS 223 (refd)

Wah Shen Development Sdn Bhd v Success Portfolio Sdn Bhd [2019] 1 MLJ 546; [2019] 5 CLJ 537, CA (refd)

Wong See Kui v Hong Hin Tin Mining Co [1969] 2 MLJ 234; [1969] 1 LNS 202 (refd)

Woon Tan Kan & Ors v Asian Rare Earth Sdn Bhd [1992] 3 CLJ Rep 786, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103

Mohd Zamri bin Ibrahim (Nurhafizah bt Aziz with him) (Afrizah & Partners) for the appellants.

Farah Shuhadah bt Razali (Nureen Natasha bt Mohd Raffie with her) (Zul Rafique & Partners) for the first respondent.

Tan Lee Kiat (Siti Nurhidayah bt Mat Saad with him) (Othman Hashim & Co) for the second respondent.

Hashim Hamzah J:

INTRODUCTION

[1] This is an action filed by the plaintiffs against the defendants under the tort of nuisance, which was initiated by way of a writ of summons and statement of claim, dated 15 August 2017 and 18 August 2017 respectively.

[2] The plaintiffs claimed against the defendants for the following reliefs and I quote:

(a) Defendan Pertama memulihkan paip gas Defendan Pertama tersebut dari mengeluarkan bau minyak (bahan kimia) dan gas ke atas tanah Plaintif-Plaintif yang dikenali sebagai PN 84564, No Lot 9316, Mukim Lumut, Daerah Manjung, Negeri Perak yang beralamat di No 2348, Jalan Sembilang I, Taman Samudera, 32040 Seri Manjung, Perak Darul Ridzuan;

(b) Alternatif bagi perkara (a), Defendan Pertama mengalihkan paip gas Defendan Pertama tersebut darI kawasan bawah tanah Plaintif-Plaintif yang dikenali sebagai PN 84564, No Lot 9316, Mukim Lumut, Daerah Manjung, Negeri Perak yang beralamat di No 2348, Jalan Sembilang I, Taman Samudera, 32040 Seri Manjung, Perak Darul Ridzuan;

(c) Defendan Kedua memulihkan saluran pembentung Defendan Kedua tersebut dari mengeluarkan bau minyak (bahan kimia) dan gas ke atas tanah Plaintif-Plaintif yang dikenali sebagai PN 84564, No Lot 9316, Mukim Lumut, Daerah Manjung, Negeri Perak yang beralamat di No 2348, Jalan Sembilang I, Taman Samudera, 32040 Seri Manjung, Perak Darul Ridzuan;

(d) Defendan-Defendan membayar kepada Plaintif-Plaintif ganti rugi am dan khas serta ganti rugi teladan yang akan ditaksirkan oleh Mahkamah Yang Mulia ini;

(e) Faedah pada kadar 5% setahun ke atas para (d) mulai dari tarikh penghakiman hingga penyelesaian sepenuhnya;

(f) Kos tindakan ini;

(g) Relief-relief lain yang difikirkan oleh Mahkamah suai manfaat dan berpatutan.

[3] The matter went for full trial. Eight witnesses gave evidence for the plaintiffs, seven witnesses gave evidence for the first defendant and six witnesses gave evidence for the second defendant.

[4] For ease of reference throughout this judgment, the list of witnesses is as follows.

[5] For the plaintiff:

(a) PW1: Jamaludin bin Idris ('first plaintiff');

(b) PW2: Fadillahton bt Zuber @ Din ('second plaintiff');

(c) PW3: Jafaridzuwi bin Jamaludin;

(d) PW4: Jafaharits bin Jamaludin;

(e) PW5: Helmi bin Hamid;

(f) PW6: Azhar bin Zainal Abidin;

(g) PW7: Dr Loo Suet San; and

(h) PW8: Dr Ruben Skantha.

[6] For the first defendant:

(a) DW1: Khairul Anuar bin Mohd Ali;

(b) DW2: Hafiz bin Abd Aziz;

(c) DW3: Sazalee Abd Aziz;

(d) DW4: Mimala a/p Arasaratnam;

(e) DW5: Azaidie bin Selli;

(f) DW6: Muhammad Azly bin Mohd Abu Bakar; and

(g) DW7: Ayatul Shariman bin Mohamed Shuhidan.

[7] For the second defendant:

(a) DW8 : Roszaind b Rajihan;

(b) DW9 : Ir Azrol bin Nordin;

(c) DW10 : Joshua a/l Philip William;

(d) DW11 : Muhammad Omar bin Muharram;

(e) DW12 : Mak Nam Fatt; and

(f) DW13 : Jugindar Singh a/l Jeswan Singh.

BRIEF FACTS

[8] The plaintiffs are the co-owners of a house located at a No 2348, Jalan Sembilang 1, Taman Samudera, 32040 Seri Manjung, Perak ('the plaintiffs' house').

[9] The first defendant is the owner of a petrol and service station located at Lot 6985-7010, Taman Samudera, 32040, Seri Manjung, Perak ('the petrol station'). A

[10] The second defendant is the national sewerage company which has been entrusted with the task of developing and maintaining a modern and efficient sewerage system for all Malaysians. The second defendant owns and maintains the underground sewerage pipelines located under the plaintiffs' house as well as under the petrol station. B

C

[11] The plaintiffs' house is located approximately 500 metres away from the petrol station and is the last house on the row. There are approximately thirty houses in between the petrol station and the plaintiffs' house.

[12] On 12 June 2012, the first plaintiff wrote a letter to the District Officer in Manjung (Bundle C p 7 'exh D8(a)') complaining that his family had been suffering certain discomfort for about one month due tothe emission of a very unpleasant odour, akin to that of chemical gas or oil, from below the floor of his master bathroom which permeated throughout his entire house. The first plaintiff also complained that sometimes the floor of his house would feel hot. D E

[13] On 22 June 2012, Manjung Municipal Council together with several government agencies such as the Department of Environment ('DOE'), and the Fire and Rescue Department ('Bomba') including the second defendant had conducted a site visit to look into the plaintiffs' complaints. The first defendant was not involved in this visit. F

[14] During the site visit, tests were conducted by PW6, a technician from DOE, using a personal gas detector. The results were duly recorded ('the said test result') (Bundle C p 13 exh 'P2'). G

[15] Based on the said test result, the officers who attended the site visit made a preliminary finding that there was a leakage of chemical or oil from the petrol station's underground tanks into the second defendant's underground main sewerage pipelines which extended to the plaintiffs' housing area. It was found that this was the main cause of the unpleasant chemical odour or gas allegedly experienced by the plaintiffs. The exact wording of the preliminary finding is as follows: H

I

> Kesimpulan/Rumusan Awal
>
> Semua wakil jabatan/agensi yang terlibat bersetuju bahawa punca bau bahan kimia yang dialami di sekitar rumah pengadu berpunca dari aliran minyak/bahan kimia dari stesen minyak (Petronas) tersebut yang telah masuk ke dalam saluran pembentung IWK.

A Dipercayai tangki/tempat simpanan minyak stesen tersebut mengalami kerosakan/kebocoran/keretakan menyebabkan ianya mengalir memasuki saluran pembentung IWK.

Setelah memasuki saluran pembentung, bahan kimia tersebut mengalami proses tindak balas tertentu dan menghasilkan bau seakan kerosin dan gas-gas tertentu B yang mampu menyebabkan kebakaran seperti gas LEL dan Nitrogen Diokside, NO2.

[16] The preliminary finding was reduced in the form of a report called 'Laporan Turun Padang' which was prepared by PW5 ('the said report') C (Bundle C pp 10–12 exh 'P2'). A copy of the said report was made available to all parties who attended the site visit, including the plaintiffs.

[17] Approximately two weeks later, the plaintiffs and their two children went to Hospital Seri Manjung to get treatment for, among others, 'alleged D nitrus oxide exposure'. Copies of their medical reports were tendered as evidence during the trial and marked as 'IDP3', 'IDP19', 'P20', and 'P21'.

[18] On 13 July 2012, a meeting was held to discuss about the plaintiffs' complaint. In the said meeting, the first defendant was requested to conduct a E pressure test on its underground sewerage tanks to ascertain whether there was any leakage and whether the first defendant should close the connection between the petrol station's sewerage tanks and main sewerage pipelines, with the second defendant's cooperation.

F **[19]** On 19 July 2012, the first defendant carried out the pressure test and the result showed that there was no leakage in the petrol station's sewerage tanks. Nevertheless, the first defendant had limited the use of the toilet at the petrol station as additional precaution.

G **[20]** On 9 August 2012, another meeting was held to further discuss about the plaintiffs' complaint. The first defendant's representative was present during this meeting. The first defendant stated that it had carried out the pressure test as requested earlier and the result of the test that there was no H leakage was made known in the meeting (Bundle C pp 29–31 'exh P4').

[21] On 14 August 2012, the sole connection between the petrol station's sewerage tanks and the main sewerage pipelines was sealed. As a result there was no longer any connection whatsoever between the petrol station and second I defendant's sewerage pipelines which flowed underneath the plaintiffs' housing area. The petrol station thereafter started to use its own private septic tank.

[22] On 20 February 2013, a further meeting was held to discuss about the plaintiffs' complaint, during which the following matters were noted:

(a) that the defendants had already sealed the connection between the petrol station's underground sewerage tank and the second defendant's main sewerage pipelines; and

(b) that the plaintiffs alleged that the odour still existed notwithstanding the above.

[23] At the end of the meeting, the first defendant was requested to conduct another test, ie the water pressure test. The first defendant duly carried out the water pressure test on all four of its underground tanks. The result of the test showed that there was no leakage whatsoever in any of its underground tanks. A copy of the water pressure test result was forwarded to Manjung Municipal Council (Bundle C at pp 54–58 exh 'P9').

[24] After that, there was no further request or direction issued by Manjung Municipal Council or any other government agencies involved to the first defendant.

[25] To date, there have been no complaints of a similar nature from other residents in the housing area, particularly the owners of the 30 houses which are more proximate to the petrol station.

LAW

[26] The plaintiffs' claim against the first defendant is essentially premised on the tort of private nuisance. It is trite that in order to succeed in an action for private nuisance, the following elements must be proven by the plaintiffs, namely:

(a) that the defendants had caused an interference with the plaintiffs' enjoyment over their land;

(b) that the interference was unreasonable; and

(c) that the interference caused damage to the plaintiffs.

[27] See *Chin Moy Yen & Ors v Chai Weng Sing & Ors* [2019] MLJU 681; [2019] 1 LNS 940 (CA), *Wah Shen Development Sdn Bhd v Success Portfolio Sdn Bhd* [2019] 1 MLJ 546; [2019] 5 CLJ 537 (CA), *Woon Tan Kan & Ors v Asian Rare Earth Sdn Bhd* [1992] 3 CLJ Rep 786 (HC), *IJM Corporation Bhd v Harta Kumpulan Sdn Bhd* [2007] 8 MLJ 591; [2007] 8 CLJ 291 (HC), *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349 and *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53.

[28] As regards the burden of proof, it is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party

on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. If the other party does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the defendant has not established his case.

[29] See ss 101 to 103 of the Evidence Act 1950, *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676 (FC), *Selvaduray v Chinniah* [1939] 1 MLJ 253; [1939] 1 LNS 107 (SC), *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; [1978] 1 LNS 223 (HC), *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147 (HC) and *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712; [2005] 5 CLJ 253 (HC).

[30] With regard to the standard of proof in civil cases, the standard of proof is on the balance of probabilities (see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 (FC)).

ISSUE

[31] The main issue in the present case is whether the plaintiffs had successfully proven their claim against the defendants on the balance of probabilities.

FINDINGS

[32] Below is the findings of this court based on all evidence adduced throughout the trial.

Whether the defendants had caused unreasonable interference with the plaintiffs' enjoyment over their land

[33] According to the plaintiffs, the unreasonable interference caused by the defendants was the emission of an unpleasant chemical odour or gas permeated throughout the plaintiffs' house due to a leakage at the first defendant's petrol station's underground sewerage tank which flowed into the second defendant's underground main sewerage pipelines and ultimately to the plaintiffs' house.

[34] In order to establish these facts, the plaintiffs relied primarily on the said test result and the preliminary finding stated in the said report. The witnesses who prepared the said test result and the said report were PW6 and PW5, respectively.

[35] According to the plaintiff, the said test result and the preliminary finding in the said report clearly showed that:

(a) the unpleasant odour or chemical gas (believed to be kerosene) was detected by PW6 near the plaintiffs' house beyond the 5% (ie at 34%) lower explosive level ('LEL') safety limit through the use of a personal gas detector;

(b) there were traces of oil seen in the petrol station's sewerage tanks and the main sewerage pipelines; and

(c) the unpleasant odour or chemical gas was emitted as a result of a leakage in the petrol station's sewerage tanks.

[36] Be that as it may, upon careful perusal of all the evidence produced throughout this trial, I agree with the learned counsel for the defendants that the most glaring loophole in the plaintiffs' case is their failure to prove the exact nature of the odour complained of and its nexus to the defendants.

[37] This finding is based on the following reasons.

[38] First and foremost, it became apparent throughout the trial that the preliminary finding stated in the said report was not conclusive and the finding was reached based on the parties' initial observation during the site visit. The plaintiffs' own witness, PW5, a technician at Manjung Municipal Council who was also involved during the site visit and the one who prepared the said report, gave evidence to that effect (pp 155–156 of the notes of proceedings).

[39] In fact, according to PW5 the said report was prepared based on the said test result. PW5 admitted during cross-examination that if the said test result was wrong then the report that he prepared would be equally wrong (pp 156–157 of the notes of proceedings).

[40] With regard to the said test result:

(a) PW6 himself admitted during examination-in-chief that the said test result contained errors and his only attempt to amend the said test result wasduring the trial;

(b) no test was conducted at the actual source of the plaintiffs' complaint which was in the hole in the master bathroom inside the plaintiffs' house (p 223 of the notes of proceedings);

(c) PW6 admitted during cross-examination that he rarely used the personal gas detector (p 223 of the notes of proceedings); and

(d) PW6 admitted during cross-examination that there are many factors which might lead to the high and different LEL readings in each place the test was conducted since the waste in the main sewerage pipelines came from various sources (pp 217–222 of the notes of proceedings).

[41] Purported to rebut the evidence of PW6, the first defendant called DW4 to give evidence. DW4 is a certified industrial hygienist from the American Board of Industrial Hygiene holding a bachelor's degree in Environmental and Occupational Health as well as a master's degree in Environmental Engineering from Universiti Putra Malaysia.

[42] In this regard, DW4 had given evidence, among others, that:

(a) she is very familiar with the handling of devices such as personal gas detectors;

(b) personal gas detectors cannot automatically detect the type of gas and must be specifically programmed to detect a particular type of gas;

(c) there are several errors contained in the said test result as follows:

(i) the said report seems to suggest that LEL is a type of gas but LEL actually stands for 'lower explosive limit' which is merely a limit which determines the level of concentration of any particular gas before fire or explosive can occur;

(ii) it is stated under 'Catatan' that 'bacaan selamat bagi gas LEL adalah: 5ppm' but LEL is actually measured in percentage and different gases would have different LEL depending on its nature; and

(iii) the reading recorded under the column 'Nitrogen Dioksida, NO2' are more that the range that the device can actually detect (up to 30ppm) and it is impossible for those exposed to the purported amount of nitrogen dioxide at the time when the test was carried out to have survived without being immediately and gravely ill or even die.

[43] It is pertinent to note that PW6 who prepared the said test result had finally admitted after rigorous cross-examination that the said test result was not accurate in lieu of all the documentary evidence presented before him during the trial (p 236 of the notes of proceedings).

[44] Secondly, PW6 had admittedduring cross-examinationthat his finding thatthe unpleasant odour or chemical gas was emitted as a result of an oil leakage in the petrol station's sewerage tanks was solely based on his presumption (p 212 of the notes of proceedings). A

[45] As a matter of fact, DW11, who was the second defendant'shead of operations in Manjung, gave evidence during cross-examination that generally, the nature of waste contained in the sewer is 'oily' (p 488 of the notes of proceedings). B

C

[46] PW6 had also admitted during cross-examination that there were inconsistent reading of the personal gas detector at different locations throughout the site visit. He further admitted that the inconsistent LEL reading recorded in the said test result suggested that there could have possibly been other factors other than the petrol stationthat could have caused the existence of the gas detected during the site visit (pp 217–222 of the notes of proceedings). D

[47] Therefore, in order to determine the nature of the gas and the nature of the traces oil, and their connection with the petrol station, samples should have been taken for testing. If this was done and the result came out positive, I am of the opinion that it would have been conclusive evidence against the first defendant. E

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[48] The fact remained that no samples of the alleged oil were taken for testing to determine whether it was in fact petrol or diesel and whether it was connected to the petrol station. This was confirmed by DW8 who was the head of the second defendant's branch in Manjung at the material time (p 443 of the notes of proceedings) and DW11 (pp 487–488 of the notes of proceedings). G

[49] Thirdly, in consequence to the preliminary finding, several meetings were held to address the issue. The defendants were initially requested to conduct a pressure test and the result showed that there was no leakage from the petrol station's sewerage tank to the main sewerage pipeline. After that, the connection between the petrol station's sewerage tank and main sewerage pipeline was sealed off and there was no longer any connection whatsoever between the petrol station and second defendant's underground sewerage pipelines that flowed underneath the plaintiffs' housing area. The petrol station thereafter started to use its own private septic tank. The first defendant was then requested to perform water pressure tests and the result confirmed that there was no leakage. H

I

[50] It can be seen from the above that the first defendant had carried out all the relevant directions given by Manjung Municipal Council at all material time.

[51] At this juncture, it is imperative to note that the results of the pressure and water pressure tests conducted by the first defendant confirmed that there was no leakage whatsoever in the petrol station's underground tanks which has fully discredited the said test result and the preliminary finding stated in the said report.

[52] It is also important to note that since August 2012, the sole connection between the petrol station, the second defendant's underground sewerage pipes and the plaintiffs' house had been sealed off. Notwithstanding the above, the plaintiffs maintained that they are still suffering from the same emitted odour or chemical gas.

[53] However, the second defendant's witnesses who went to the plaintiffs' house for another inspection on 5 April 2016 ie DW10, DW11 and DW13 maintained that there was no longer any odour or gas as alleged by the plaintiffs detected around the plaintiffs' house at that time.

[54] In the present case, the plaintiffs are under the duty to prove that the unreasonable interference was caused by the defendants. For reasons mentioned above, I am of the view that they had failed to do so.

Whether the interference caused damage to the plaintiffs

[55] Damage is an essential element in proving nuisance. In the case of *Wong See Kui v Hong Hin Tin Mining Co* [1969] 2 MLJ 234; [1969] 1 LNS 202, it was held as follows:

> Therefore, *the plaintiff has not discharged his burden of proof on the question of damage caused to him* by the defendant company. The test is one of balance of probabilities, not the existence of possibilities.
>
> *Since damage is one of the essentials of nuisance, (see Sedleigh-Denfield v O'Callaghan* [1940] AC 880*) and negligence, (see JR Munday, Limited v London County Council* [1916] 2 KB 331*), the plaintiff's case founded on these two causes of action must fail* ... (Emphasis added.)

[56] In the present case, the plaintiffs claimed that as a result of the alleged unreasonable interference caused by the defendants, the plaintiffs and their family had suffered health issues and could not live in their home.

[57] With regard to the alleged health issues, the plaintiffs produced four medical reports, two of which were marked as ID. On this issue, I am in full agreement with Vazeer Alam Mydin Meera JC (as His Lordship then was) in the case of *Associated Pan Malaysia Cement Sdn Bhd v Westwood Development Sdn Bhd* [2014] 7 MLJ 394; [2013] 10 CLJ 95 where it was held as follows:

> [34] In any event, the defendant's survey plan remained an ID document, being marked as 'IDD14'. *An ID document is not a document that has been properly admitted as evidence at trial. It is trite that such documents do not form part of the evidence for the court's consideration and any evidence or testimony in regards to these document are to be disregarded* (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180; [1977] 1 LNS 92). Therefore, the only approved survey plan before this court is the 2005 Survey Plan of the plaintiff. (Emphasis added.)

[58] The other two medical reports were that of the plaintiffs' two children (exhs 'P20' and 'P21') who, according to the reports, suffered from chrome gas inhalation and upper respiratory tract infection respectively.

[59] However, the two doctors ie PW7 and PW8 who treated the plaintiffs' children had agreed during cross-examinationthat the plaintiffs' children were merely having the symptoms of common sore throat and cough. It was also agreed by PW7 and PW8 that the medications prescribed to the plaintiffs' children were generally given to treat patients with sore throat and cough. Furthermore, it was agreed by both PW7 and PW8 that the plaintiffs' children may possibly suffer from common flu or viral infection at that time (pp 256–258 and 263–265 of the notes of evidence).

[60] Thus, there was no direct and definitive link whatsoever between what the plaintiffs' children had suffered at that time with the defendants.

[61] Another claim made by the plaintiffs was that they have not been able to continuously live in their home since the issues occurred in the year 2012. It was further claimed that they have only resumed living in their home again in 2017. Suffice to say that no evidence was led to support these bare statements made by the plaintiffs.

[62] Therefore, the plaintiffs had failed to prove that they had suffered any damage.

THE PLAINTIFFS' PRAYERS

[63] Based on their pleading, the plaintiffs have sought for injunctions and damages against the defendants (see para 2 of this judgment).

[64] As against the first defendant, the plaintiffs claimed for the following mandatory injunctions, namely:

(a) for the first defendant to fix their gas pipe from emitting odours from oils and gasses into the plaintiffs' house; and

(b) alternatively, for the first defendant to remove its gas pipe underneath the plaintiffs' house.

[65] However, throughout the trial there was no evidence led to prove the existence of any gas pipes neither at the petrol station nor underneath the plaintiffs' house. Therefore, the injunctive reliefs prayed for by the plaintiffs against the first defendant are misconceived and cannot be granted by this court.

[66] As against the second defendant, the injunctive relief sought by the plaintiffs is for the second defendant to fix its underground sewerage pipelines from emitting odours from oils and gasses into the plaintiffs' house.

[67] On this issue, as alluded to earlier, the plaintiff had failed to show any unreasonable interference caused by the defendants (including the second defendant) against the plaintiffs' enjoyment over their land. It was also alluded to earlier that since August 2012, the sole connection between the petrol station, the second defendant's underground sewerage pipes and the plaintiffs' house had been sealed off. In addition it has also become evident during trial that there were minor cracks were detected in the second defendant's main underground sewerage pipelines but according to the second defendant's witnesses ie DW11, DW12 and DW13, the cracks are normal and not serious as no leakage was detected. In another inspection conducted on 5 April 2016 the second defendant's witnesses maintained that there was no longer any odour or gas as alleged by the plaintiffs detected around the plaintiffs' house.

[68] Therefore, the injunctive relief prayed for by the plaintiffs against the second defendant is equally misconceived and cannot be granted by this court.

[69] The plaintiffs have also prayed for general, special and exemplary damages against the defendants for the damage that they had purportedly suffered. However, based on what has been alluded to earlier regarding the plaintiffs' failure to prove damage against the defendants, this prayer is dismissed in its entirety.

CONCLUSION

[70] In conclusion, for reasons enumerated above, the plaintiffs' claim against the defendants is dismissed with costs of RM40,000 to each defendant.

Dismissing plaintiff's claim with costs of RM40,000.

Reported by Nuzul Fitrie